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RECONCEPTUALIZING BATTERED WOMAN SYNDROME EVIDENCE: PROSECUTION USE OF EXPERT TESTIMONY ON BATTERING

PAULA FINLEY MANGUM*

*Sometimes [he] even made me believe that I was guilty of something . . . that I made him slip and bang his bad knee. That I made him beat me up, that it was me who made the fist, angled the foot, brought down a hand hard. Hard.*¹

*Another specifically American form of ideology asserts the belief in freedom. "Women are free to go; why don't they just leave?" This definition of freedom ignores the fact that many women have nowhere to go and no money to stay there once they arrive.*²

*The mystery in this case, as in all battered woman cases, is why [she] remained with [him] despite repeated abuse.*³

INTRODUCTION

Defining domestic violence as a social and legal problem, not merely a phenomenon of violent individuals or private relationships, is one of the great achievements of feminism.⁴ For many years, the legal

* Executive Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ ANNA QUINDLEN, BLACK AND BLUE 5 (1998).

² SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 58 (1982).

³ Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992).

⁴ See LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 251 (1988); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991); see also CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 169 (1987) (feminism revealed "a whole shadow world of previously invisible silent abuse"). Domestic violence refers to the use of physical force by one adult against another adult with whom there is currently, or has been in the past, an intimate relationship. See Del Martin, *The Historical Roots of Domestic Violence*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 3 (Daniel Jay Sonkin ed., 1987) [hereinafter DOMESTIC VIOLENCE ON TRIAL]. Prior to the emergence of the feminist movement in the 1970s, the United States had never produced a major campaign specifically directed against domestic violence. See GORDON, *supra* at 253-54; SCHECHTER, *supra* note 2, at 29. Earlier efforts against wife beating had been addressed indirectly through temperance, child-welfare, and social purity campaigns. See GORDON, *supra* at 254. These early efforts to identify wife beating as a social problem "tended

system, like society at large, ignored the breadth and severity of domestic violence, viewing it as a private and personal matter, not a criminal act.⁵ Beginning in the 1970s, feminists and the battered women's movement⁶ focused their efforts on trying to transform the conceptualization of domestic violence from a private, family matter to a serious crime.⁷ Feminist theory revealed the impact of oppression and unequal power and incorporated these understandings into an analysis of the dynamics of domestic violence.⁸ Battered women's advocates argued that vigorous prosecution of batterers would communicate a message to society regarding the criminal nature of the offense and the seriousness with which the crime should be viewed.⁹ For prosecutors, this

to lose momentum and support, even to disappear altogether," absent the influence of feminism. *Id.* at 26.

This paper focuses on issues related to heterosexual domestic violence and the prosecution of male batterers. References to batterers as men and victims as women reflect the fact that women are more likely than men to experience violence committed by an intimate partner. See RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995). Issues associated with domestic violence in lesbian and gay relationships raise questions beyond the scope of this paper.

⁵ For discussions of the history of social and legal responses to domestic violence, see R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 59-74 (1979); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 69-144 (1987).

⁶ The battered women's movement developed as an outgrowth of the feminist movement of the late 1960s and early 1970s. See SCHECHTER, *supra* note 2, at 29-52. In the earlier, formative years of the feminist movement, battering was not identified as a women's issue. See PLECK, *supra* note 5, at 182-85. It was not until rape emerged as a feminist issue that women turned their attention to wife beating: "It was ironic that rape appeared as a women's issue before wife beating, because complaints of wife abuse to the police far exceeded reports of sexual assault." See *id.* at 184. The anti-rape movement provided a model for victim advocacy in the battered women's movement. See *id.* at 185; see also SCHECHTER, *supra* note 2, at 34 (identifying the anti-rape movement as a precursor to and model for the battered women's movement).

⁷ See SCHECHTER, *supra* note 2, at 159; Jane Maslow Cohen, *Private Violence and Public Obligation: The Fulcrum of Reason*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 349, 350 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

⁸ See SCHECHTER, *supra* note 2, at 251 (identifying wife beating as a method for perpetuation of the imbalance of power between men and women). Schechter explains that viewing woman-battering solely as victimization, rather than an aspect of oppression, obscures the political and social context in which it occurs. See *id.* Feminism's description of domestic violence is premised on an understanding that battering is the use of violence to exert power and control. See, e.g., *id.* at 219-24; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53-60 (1991); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 537 (1992). Batterers' tactics for asserting and maintaining power and control include physical violence and sexual assault; mental and emotional abuse; and intimidation, manipulation, and isolation of the victim. See Schneider, *supra* at 537-38.

⁹ See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 184 (1987).

meant reversing an historic tendency to neglect domestic violence cases.¹⁰

Developing an effective prosecutorial response to domestic violence includes facing challenges and misconceptions surrounding the experiences of battered women.¹¹ When domestic violence is an issue in a criminal trial, it may be important for the factfinder to understand the nature of battering relationships and battered women's experiences.¹² Expert testimony on battering and its effects may be offered to help a factfinder understand those issues.¹³ Much of the testimony on the effects of battering has been admitted in criminal trials under the rubric of "battered woman syndrome," a term used as a shorthand reference to the body of scientific and clinical literature that is the basis for expert testimony in domestic violence cases.¹⁴ While most discussions of the use of battered woman syndrome evidence have focused on the introduction of such evidence in the defense of a battered woman accused of killing her batterer, its introduction in the prosecution of a batterer is an emerging trend.¹⁵

This Note will explore and evaluate the use of such expert testimony in the prosecution of a batterer. Part I presents an overview of the criminal justice system's response to domestic violence, with a focus on the development of arrest and prosecution policies. Part II explores the development of battered woman syndrome and its initial legal applications. Part III critiques battered woman syndrome and presents a rationale for renaming testimony which has been presented under that rubric. Part IV examines the use of this testimony in the prosecution of crimes of domestic violence. Finally, Part V concludes that the

¹⁰ See Esta Soler, *Domestic Violence is a Crime: A Case Study—San Francisco Family Violence Project*, in DOMESTIC VIOLENCE ON TRIAL, *supra* note 4, at 21, 33.

¹¹ See U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 23-34 (1982) [hereinafter COMM'N REPORT].

¹² See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1193 (1993).

¹³ See *State v. Kelly*, 478 A.2d 364, 379 (N.J. 1984). The court explained the value of expert testimony for the factfinder:

[A] battering relationship embodies psychological and societal features that are not well understood by lay observers. Indeed, these features are subject to a large group of myths and stereotypes. It is clear that this subject is beyond the ken of the average juror and thus is suitable for explanation through expert testimony.

See *id.* at 379.

¹⁴ See Bonnie J. Campbell, *Foreword to U.S. DEP'T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS i* (1996) [hereinafter *VALIDITY & USE*].

¹⁵ See *infra* Part IV.

use of expert testimony on battering and its effects is an important tool in bringing about an effective prosecutorial response to domestic violence.

I. THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE

Despite its power to enforce laws and punish assailants, the criminal justice system was, for many years, unresponsive to battered women and their families.¹⁶ Police and prosecutors adopted a stance of non-intervention and selective non-enforcement of the law when violence occurred between family members.¹⁷

A. Arrest

Prior to the 1970s, most police opposed the use of criminal justice sanctions in cases of domestic violence.¹⁸ Police agencies endorsed crisis intervention strategies as the most appropriate method for dealing with the problem of "family squabbles," and as a result, batterers were rarely arrested.¹⁹

¹⁶ See COMM'N REPORT, *supra* note 11, at 2-4; Soler, *supra* note 10, at 21. The criminal justice system comprises law enforcement, prosecution and defense counsel, courts, probation, and corrections. See Michael Steinman, *The Public Policy Process and Woman Battering: Problems and Potentials*, in WOMAN BATTERING: POLICY RESPONSES 1, 1 (Michael Steinman ed., 1991). Part I of this Note focuses on the police and prosecution components of the criminal justice system. See *infra* text accompanying notes 17-40.

¹⁷ See JEFFREY FAGAN, NAT'L INST. OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 6 (1996); Soler, *supra* note 10, at 21. Before the 1970s, most legal institutions responded to domestic violence with ambivalence; police had "hands off" policies regarding domestic disputes, and even if they did arrest a batterer, prosecutors neutralized the action by refusing to prosecute. See FAGAN, *supra* at 6, 11.

¹⁸ See R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 146, 152 (1992). Police officers considered domestic violence a quasi-criminal problem only peripherally related to law enforcement. See COMM'N REPORT, *supra* note 11, at 12. Moreover, they considered domestic disturbance calls dangerous, emotionally charged, difficult to resolve, and frustrating because of their recurrence. See *id.* at 13-14.

¹⁹ See COMM'N REPORT, *supra* note 11, at 18-19; DOBASH & DOBASH, *supra* note 18, at 160-65. In response to most incidents of domestic violence, police attempted to arbitrate or mediate. See Soler, *supra* note 10, at 22. Police officers were taught crisis intervention strategies—using communication and interactive skills to intervene in "family squabbles"—and arrest was discouraged. See DOBASH & DOBASH, *supra* note 18, at 161. According to a 1974 police training manual, "In dealing with family disputes the power of arrest should be exercised as a last resort. The officer should never create a police problem when there is only a family problem existing." CRISIS INTERVENTION AND THE POLICE: SELECTED READINGS 111 (Richard W. Kobetz ed., 1974). "In family dispute interventions the most important tool the officer has at his command is the technique of being a good listener." *Id.* at 117. "The intervening officer, by demonstrating his

Moreover, most police could not legally make a warrantless arrest unless a misdemeanor occurred in the officer's presence—the in-presence requirement—or, alternatively, if the officer had probable cause to believe that a felony had taken place.²⁰ Since most domestic violence incidents were considered misdemeanors rather than felonies, under the in-presence requirement, police did not have the legal authority to make an arrest at the scene.²¹ Battered women's advocates undertook legislative reform efforts to create an exception to the in-presence requirement in order to permit warrantless arrest when the officer has probable cause to believe that someone has committed a misdemeanor or violated a restraining order.²² All fifty states now provide that in cases of domestic violence, police officers can make a warrantless arrest.²³

Several court challenges were also successful in bringing about reforms in police treatment of victims of domestic violence.²⁴ As a result of lawsuits, consent decrees, and widespread legislative reform, police

ability to listen, may well have transmitted this quality to the participants. Thus, the officer has instilled in the family group the importance of being able to listen." *Id.* at 118. "But as a general guideline, avoid, if possible, resorting to arrest as the solution to a family dispute." *Id.* at 123 (emphasis added).

²⁰ See COMM'N REPORT, *supra* note 11, at 16; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996).

²¹ See Hanna, *supra* note 20, at 1859. Another area of inquiry concerning police response to domestic violence is whether police officers were accurately distinguishing between misdemeanor and felony assaults. See COMM'N REPORT, *supra* note 11, at 16. Rather than taking care to determine whether the elements of a felony were present, some officers simply classified the vast majority of domestic assaults as misdemeanors. See *id.* This presumption allowed officers to avoid arresting batterers even in those cases in which the officer clearly had the authority to do so. See *id.*

²² See SCHECHTER, *supra* note 2, at 159; Hanna, *supra* note 20, at 1859; see also JULIE E. HAMOS, STATE DOMESTIC VIOLENCE LAWS AND HOW TO PASS THEM: A MANUAL FOR LOBBYISTS 38 (1980) (battered women's advocate's compilation of lobbying process in support of domestic violence legislation, including warrantless arrest provisions).

²³ See Hanna, *supra* note 20, at 1859. By 1989, every state, with the exception of West Virginia, had eliminated the in-presence requirement in order to permit warrantless arrests in misdemeanor cases of domestic violence. See *id.* at n.35. In 1994, the West Virginia legislature finally enacted a warrantless arrest statute. See W. VA. CODE § 48-2A-14 (1998); Toni L. Harvey, Student Work, *Batterers Beware: West Virginia Responds to Domestic Violence with the Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181, 185 (1994).

²⁴ See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984) (police department liable for policies which violated equal protection for victims of domestic violence); *Bruno v. Codd*, 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977), *rev'd on other grounds*, 393 N.E.2d 976 (N.Y. App. Div. 1979) (police should not decline to make arrest simply because assailant is victim's husband). See generally Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 53-60 (1992) (describing court challenges instituted to force police to change their practices and procedures regarding domestic violence calls).

departments implemented or revamped policies for responding to domestic violence.²⁵

B. Prosecution

With a nationwide trend toward preferred arrest policies and the expansion of police powers to make warrantless arrests of batterers, the attention of battered women's advocates shifted to the role of prosecutors in the handling of domestic violence cases.²⁶ Having criticized police for failing to respond to domestic violence by employing non-intervention practices, advocates next criticized prosecutors for failing to follow through with the prosecution of batterers.²⁷ Advocates recognized that prosecutors had an integral role to play in implementing state domestic violence laws and in exerting influence over other components of the criminal justice system.²⁸

Like their counterparts in law enforcement, for many years prosecutors regarded domestic violence as a private matter, a waste of valuable prosecutorial time, and a problem to be solved outside the criminal justice system.²⁹ Prosecutors did not treat domestic violence with

²⁵ See Steinman, *supra* note 16, at 7; Zorza, *supra* note 24, at 59-60. In a 1984 report, the United States Attorney General recommended that arrest should be the standard police response to domestic violence. See ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE FINAL REPORT 22-23 (Sept. 1984). Most states have since enacted or revised legislation which affects how police perform their duties in domestic violence cases, recommends or requires arrest of batterers, and includes provisions for police training. See NEAL MILLER, NAT'L INST. OF JUSTICE, DOMESTIC VIOLENCE LEGISLATION AFFECTING POLICE AND PROSECUTOR RESPONSIBILITIES IN THE UNITED STATES: INFERENCES FROM A 50-STATE REVIEW OF STATE STATUTORY CODES 1-2 (1997).

²⁶ See Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES, *supra* note 16, at 95; Hanna, *supra* note 20, at 1860; Soler, *supra* note 10, at 26. A century earlier, there had been limited efforts aimed at prosecution reform: in the late 1870s, a small campaign, led almost exclusively by men, argued that brutality was unmanly and urged increased criminal prosecutions and severe sentences for wife beaters. See GORDON, *supra* note 4, at 254-55. However, it was not until the police began making more arrests in the 1980s that advocates discovered how many barriers existed in the prosecution of batterers. See Cahn & Lerman, *supra* at 95-96.

²⁷ See Hanna, *supra* note 20, at 1860-61.

²⁸ See COMM'N REPORT, *supra* note 11, at 23; *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1540 (1993) [hereinafter *Developments in the Law*]; see also Sheila James Kuehl, *Forum: Mandatory Prosecution in Domestic Violence Cases*, 7 UCLA WOMEN'S L.J. 169, 169 (1997) (prosecution plays a major role in the criminal justice system's response to domestic violence). Prosecutors influence police practices by sending formal or informal messages regarding priorities accorded to law enforcement issues and by advising on the content of criminal statutes. See COMM'N REPORT, *supra* note 11, at 23. Prosecuting attorneys also have an influence on the actions of the court by the manner in which they select, prepare, and present cases brought to trial. See *id.*

²⁹ See COMM'N REPORT, *supra* note 11, at 25. Some prosecutors expressed reservations about

the same seriousness as stranger assault and they assigned low priority to domestic violence cases.³⁰ Citing victim non-cooperation, reluctance, or unwillingness to proceed, prosecutors too often failed to initiate charges and to follow through with criminal prosecution.³¹

Attributing low rates of prosecution to problems with victim non-cooperation became a self-fulfilling prophecy: prosecutors' attitudes and conduct affected victim cooperation.³² Thus, prosecutors who believed that abuse victims would not cooperate with the prosecution of their cases actually discouraged victims from pressing charges in court.³³ Battered women's advocates argued that criminal prosecution and punishment would send a clear message that domestic violence is a serious crime, and they encouraged reform of prosecution policies and strategies.³⁴

Reforms focused on recommending and implementing aggressive prosecution in domestic violence cases.³⁵ Aggressive prosecution poli-

bringing charges in cases of domestic violence because of concerns about preserving the marital relationship between assailant and victim. *See id.* By concluding that considerations for a "time-honored concept, the sanctity of marriage" override society's interest in the enforcement of criminal laws, prosecutors effectively promote policies that measure out protection to individuals depending upon their relationship to the abuser, and not upon the wrong suffered. *See id.* at 25-26.

³⁰ *See Developments in the Law, supra* note 28, at 1555. Even if domestic violence cases were prosecuted, many were charged or pled down to misdemeanors in spite of alleged conduct that constituted a felony. *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1521 n.55 (1998).

³¹ *See* Hanna, *supra* note 20, at 1860.

³² *See* COMM'N REPORT, *supra* note 11, at 33; Cahn & Lerman, *supra* note 26, at 100.

³³ *See* COMM'N REPORT, *supra* note 11, at 33. Prosecutors devised procedures to screen out domestic violence cases in which they believed the victim was not likely to cooperate. *See id.* at 29. These procedures included testing the victim's sincerity and tenacity by pointing out the hardships incumbent upon the complaining witness and suggesting that the final result might not be worth the trouble. *See id.* Additionally, prosecutors sometimes imposed a mandatory "cooling off period" after the beating during which charges were not brought, thus discouraging a wavering or reluctant victim. *See id.*

³⁴ *See, e.g.,* HAMOS, *supra* note 22, at 36 ("criminal prosecution lends a tenor of seriousness that the issue of domestic violence requires. . . . [I]t may act as a deterrent to the commission of the crime"); *Developments in the Law, supra* note 28, at 1523 ("stern criminal approach dispels any lingering myths of society's acceptance of wife beating or exaggerated and antiquated notions of family privacy as a shield to criminal behavior.")

³⁵ *See, e.g.,* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 7 (1993) [hereinafter INTERVENTIONS] (aggressive prosecution policy requires staff and resources to provide consistent and supportive victim contact and follow-up); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 176 (1997) (special attention should be paid to the prosecution of batterers). This commentator argues:

Aggressive prosecution is the appropriate response to domestic violence cases for several reasons. First, domestic violence affects more than just the individual victim;

cies require that prosecutors take responsibility for filing and pursuing charges in cases of domestic violence and develop the expertise required to prosecute domestic violence cases, even when a victim is reluctant or uncooperative.³⁶ Specifically, vigorous and affirmative prosecution efforts include handling cases by vertical prosecution,³⁷ implementing policies that do not place victims in the position of initiating their own cases,³⁸ instituting no-drop policies,³⁹ and developing skill in

it is a public safety issue that affects all of society. Second, prosecutors cannot rely upon domestic violence victims to appropriately vindicate the State's interests in holding batterers responsible for the crimes they commit because victims often decline to press charges. Third, prosecutors must intervene to protect victims and their children and to prevent batterers from further intimidating their victims and manipulating the justice system.

Wills, *supra* at 173-74. *But cf.* Hanna, *supra* note 30, at 1506 n.2 (acknowledging that aggressive prosecution has costs with respect to battered women's autonomy and decision-making).

³⁶ See INTERVENTIONS, *supra* note 35, at 7; Cahn & Lerman, *supra* note 26, at 100. Although most states have enacted legislation calling for domestic violence training for police officers, very few states have provisions for training prosecutors in the handling of domestic violence cases. See MILLER, *supra* note 25, at 6.

³⁷ In vertical prosecution, one prosecutor is assigned to a case from start to finish, so that the victim is consistently working with one attorney. See INTERVENTIONS, *supra* note 35, at 13. In addition to benefiting the victim, vertical prosecution case assignments allow prosecutors to develop expertise in handling domestic violence cases. See Cahn & Lerman, *supra* note 26, at 104.

³⁸ In cases of stranger assault, prosecutors usually signed the complaints, but in domestic violence cases, prosecutors tended to require the victim to sign the complaint as a way of testing her resolve to proceed with the case. See Cahn & Lerman, *supra* note 26, at 100. This practice not only discourages prosecution, it also is dangerous for a battered woman, leaving her vulnerable to further attack and intimidation by her batterer in an effort to force her to drop charges. See *id.*; see also *supra* note 33 (describing prosecution procedures that discourage and endanger battered women). Batterers often are "inextricably intertwined" in the lives of their victims, making the circumstances of a domestic violence case dissimilar from a case where the assailant and victim are strangers. See Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 196-97 & n.49 (1997). "[T]he fact that the victim knows the defendant changes the complexion of the case. At the very least, prosecutors have to deal with the problem of the witness who is afraid to testify, for the perpetrator is privy to every intimate detail of her whereabouts." *Id.* at n.49. Thus, policies asserting that prosecution is the obligation of the prosecutor, and not the victim, not only deter batterers from pressuring victims to drop charges, but also demonstrate the state's strong condemnation of the batterer's conduct. See Cahn & Lerman, *supra* note 26, at 100-01.

³⁹ Under no-drop prosecution policies, the prosecutor makes the decision whether to drop charges or to proceed with a case regardless of a victim's wishes. See Cahn & Lerman, *supra* note 26, at 101. No-drop policies vary in their implementation; some jurisdictions mandate participation by the victim, while others do not force victim participation but encourage it. See Hanna, *supra* note 20, at 1861-64. However, some commentators are critical of no-drop policies, arguing that the state should not use its power to compel women to help prosecute their batterers nor take away women's choices about whether to be involved in the criminal justice system. See Cahn & Lerman, *supra* note 26, at 101; Hanna *supra* note 20, at 1853; Mills, *supra* note 38, at 184-85.

proving cases in court, even with a hostile or reluctant victim or witness.⁴⁰

II. THE DEVELOPMENT OF BATTERED WOMAN SYNDROME AND ITS LEGAL APPLICATIONS

A. *The Conceptualization and Development of Battered Woman Syndrome*

Battered woman syndrome is a descriptive term that refers to a pattern of responses and perceptions found in women who have been subjected to physical and mental abuse by their male partners.⁴¹ Lenore Walker introduced the concept of battered woman syndrome in her 1979 book, *The Battered Woman*, and further developed it in her 1984 book, *The Battered Woman Syndrome*.⁴² Walker hypothesized two theories to account for the development of the behavioral and psychological characteristics of battered woman syndrome: learned helplessness and the cycle of violence.⁴³

1. Learned Helplessness

Walker's learned helplessness theory derived from psychologist Martin Seligman's experiments with laboratory animals.⁴⁴ Seligman discovered that laboratory dogs, after being subjected to repeated pain over which they had no control, exhibited a learned helplessness and failed to escape even when given the opportunity.⁴⁵ Walker applied this theory to battered women and proposed that women's experience with

⁴⁰ See *infra* text accompanying notes 110–46.

⁴¹ See Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom*, 16 LAW & HUM. BEHAV. 273, 274 (1992); Christine Emerson, Note, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 320 (1996).

⁴² LENORE E. WALKER, *THE BATTERED WOMAN* (1979); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984). Walker conducted a study of over 400 battered women in order to learn about domestic violence from the battered woman's perspective and to identify key psychological and sociological factors that constitute the battered woman syndrome. See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* at 1. Walker defined battered woman syndrome as a cluster of psychological characteristics exhibited by women living in violent relationships. See *id.* These psychological characteristics, Walker concluded, did not result from "specific personality traits which would suggest a victim-prone personality"; rather, the characteristics developed as a result of battered women's perceptions regarding their batterers' violent behavior. See *id.* at 7.

⁴³ See WALKER, *THE BATTERED WOMAN*, *supra* note 42, at 42–70; WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 42, at 86–97.

⁴⁴ See WALKER, *THE BATTERED WOMAN*, *supra* note 42, at 45–54.

⁴⁵ See *id.* at 45–46. Seligman and his researchers placed dogs in cages and administered random electric shocks. See *id.* at 46. The dogs learned that no matter what response they made, they could not control the shock, and they subsequently became compliant, passive, and submis-

attempts to control the violence of their batterers would, over time, produce learned helplessness and diminish the women's motivation to respond.⁴⁶ She hypothesized that after battered women are subjected to repeated abuse over which they believe they have no control, they become passive and feel unable to have any influence upon what will happen to them.⁴⁷ "Once the women are operating from a belief of helplessness," Walker concluded, "the perception becomes reality and they become passive, submissive, 'helpless.'"⁴⁸ Walker theorized that this learned helplessness explained why battered women did not attempt to free themselves from a battering relationship.⁴⁹

2. Cycle of Violence

The second theoretical component of Walker's conceptualization of battered woman syndrome was the cycle of violence.⁵⁰ Walker discovered that battered women experienced a battering cycle with three distinct phases: (1) the tension-building phase, (2) the acute battering incident, and (3) the loving-repentant phase.⁵¹ During the first phase, there is a gradual escalation of tension as the batterer expresses dissatisfaction and hostility, and the woman attempts to placate him.⁵² The tension continues to build until the transition to phase two, the acute battering stage, when the batterer typically unleashes a barrage of verbal and physical aggression.⁵³ Phase three follows, the contrition

sive. *See id.* Even when escape was made possible, the dogs were unable to respond voluntarily; they refused to leave their cages and made no attempt to avoid the shock. *See id.*

⁴⁶ *See* WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 42, at 87.

⁴⁷ *See* WALKER, THE BATTERED WOMAN, *supra* note 42, at 47.

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 55-70; WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 42, at 95-104.

⁵¹ *See* WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 42, at 95.

⁵² *See id.* The woman attempts to calm the batterer by becoming nurturing and compliant, or by trying to stay out of his way. *See* WALKER, THE BATTERED WOMAN, *supra* note 42, at 56. She may blame external factors—trouble at work or drinking too much—for the batterer's abusiveness. *See id.* at 57. Eventually, as Walker notes:

Exhausted from the constant stress, she usually withdraws more from the batterer, fearing she will inadvertently set off an explosion. He begins to move more oppressively toward her as he observes her withdrawal. He begins to look for expressions of her anger, sensing it even though she may still deny it or think she is successfully hiding it. Every move she makes is subject to misinterpretation. He hovers around her, barely giving her room to breathe on her own. Tension between the two becomes unbearable.

Id. at 59.

⁵³ *See* WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 42, at 96. The trigger for

stage, in which the batterer may apologize, show kindness and remorse, and offer gifts and promises.⁵⁴ The batterer's behavior during this period reinforces a battered woman's hopes that he will change and encourages her to remain in the relationship.⁵⁵ Thus, the stage is set for the cycle of violence to recur, and as the woman experiences repeated battering, she feels powerless to attempt escape.⁵⁶

B. *Legal Applications of Battered Woman Syndrome*

Armed with Walker's conceptualization of battered woman syndrome, including its theories of learned helplessness and the cycle of violence, defense lawyers were the first to successfully argue for the admissibility of battered woman syndrome evidence in the context of self-defense claims.⁵⁷ Homicide cases involving battered women who killed their assailants presented a number of impediments to traditional self-defense claims.⁵⁸ Typically, a woman who killed her batterer

moving into phase two, the acute battering incident, is rarely the battered woman's behavior; rather, it is usually an external event or the internal state of the batterer. See WALKER, *THE BATTERED WOMAN*, *supra* note 42, at 60. The acute battering stage is over when the batterer stops. See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 42, at 96. When the battering stops, a sharp reduction in the tension that had been building prior to the battering incident results. See *id.* Walker points out, "This in itself is naturally reinforcing. Violence often succeeds because it does work." *Id.*

⁵⁴ See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 42, at 96. The third phase is characterized by loving, kind, and contrite behavior by the batterer—he begs for forgiveness and promises that he will never do it again. See WALKER, *THE BATTERED WOMAN*, *supra* note 42, at 65. Although this stage brings with it a period of relative calm, the length of that calm is difficult to predict. See *id.* at 69. Most women report that before they know it, the calm, loving behavior gives way to phase one tension-building, and the cycle of violent behavior begins again. See *id.*

⁵⁵ See WALKER, *THE BATTERED WOMAN SYNDROME*, *supra* note 42, at 96.

⁵⁶ See WALKER, *THE BATTERED WOMAN*, *supra* note 42, at 55. In the tension-building phase of the cycle of violence, a battered woman may go to great lengths to avoid upsetting the batterer, but she has learned from past experience that she is powerless to prevent the rest of the cycle from occurring. See *id.* at 58. In addition, from the perspective of the battered woman, she cannot predict the kind of violence that will occur during the acute incident of phase two. See *id.* at 60. Thus, lack of predictability and lack of control characterize her experience of violence at the hands of her batterer. See *id.* at 61. Walker theorizes that such factors—lack of predictability and lack of control—contribute to a battered woman's perception that she is helpless to effect any change in or exert any control over the battering to which she is subjected. See *id.* at 47.

⁵⁷ There is an extensive body of commentary on the use of battered woman syndrome evidence to support a battered woman's self-defense claim. See, e.g., David L. Faigman and Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980); Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982); Jeffery Robinson, Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 HARV. WOMEN'S L.J. 161 (1981).

⁵⁸ See Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 201 (1986).

had to explain why she stayed in the relationship and did not leave her home; why she did not seek other assistance before acting; why she believed that this time the danger to her was imminent when other times she had been beaten, had not acted, and had survived.⁵⁹

To counteract these questions, the defense argued that expert testimony about battered woman syndrome was necessary to show that a woman who killed her batterer had a reasonable apprehension of imminent death or serious bodily injury as required under self-defense doctrine.⁶⁰ The purpose of this testimony was to assist the judge and jury in evaluating the reasonableness of the battered woman's actions—by explaining why some battered women did not perceive that they had certain options available to protect themselves, and therefore, did not exercise those options.⁶¹ Thus, the goal of expert testimony on battered woman syndrome is to explain the context in which a specific defendant acted in self-defense, as well as to dispel the common myths and misconceptions about battered women.⁶²

Since its emergence in the late 1970s, expert testimony on battered woman syndrome for defense purposes has been admitted in some form in every state.⁶³ Admissibility of battered woman syndrome

⁵⁹ See *id.*

⁶⁰ See *id.* at 201–02.

⁶¹ See Dutton, *supra* note 12, at 1197; see generally *Smith v. State* 277 S.E.2d 678, 683 (Ga. 1981) (“expert’s testimony explaining why a person suffering from battered woman’s syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves.”); *State v. Kelly*, 478 A.2d 364, 375 (N.J. 1984) (“expert testimony . . . would have bolstered [the battered woman’s] credibility. Specifically, by showing that her experience, although concededly difficult to comprehend, was common to that of other women who had been in similarly abusive relationships”); *State v. Allery*, 682 P.2d 312, 316 (Wash. 1984) (“the defense has the option to explain her feelings to enable the jury to overcome stereotyped impressions about women who remain in abusive relationships.”).

⁶² See Schneider, *supra* note 58, at 201. The typical content of expert testimony on battered woman syndrome in a self-defense case includes: a description of what research has shown to be characteristics of battered women, an explanation that these findings often go against prevailing misconceptions about battered women, and a concluding presentation of information about the defendant herself and the extent to which her experiences and reactions are consistent with traits that typify battered women. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 425 n.167 (1991).

⁶³ See JANET PARRISH, U.S. DEP’T OF JUSTICE, *TREND ANALYSIS: EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS IN CRIMINAL CASES* 12–17 (1996). In 21 states there is an explicit holding by either a high, intermediate, or trial court that expert testimony on battering and its effects may be admissible when proffered by the defendant. See *id.* at 13. Seven states have intermediate or high court decisions that implicitly recognize the admissibility of expert testimony on battering and its effects without discussing the issue. See *id.* at 14. Six states admit such testimony on a limited basis; another six states admit it only if certain conditions are met. See *id.*

evidence is affected by the state's self-defense standard and the state's specific holdings on the relevance of expert testimony for a particular purpose.⁶⁴

III. CRITIQUE OF BATTERED WOMAN SYNDROME: RENAMING EVIDENCE ON BATTERING AND ITS EFFECTS

A. *The Inadequacies and Contradictions of Battered Woman Syndrome*

In the years following Lenore Walker's conceptualization and popularization of battered woman syndrome, a number of critical responses revealed inadequacies and contradictions in Walker's assumptions about battered women's behavior.⁶⁵ Critics acknowledged that battered woman syndrome had signaled an improvement in traditional approaches to recognizing women's experiences and overcoming sex-bias in the law of self-defense.⁶⁶ Nevertheless, critics also recognized that battered woman syndrome perpetuated the very same stereotypic images of battered women that feminists had sought to overcome.⁶⁷ The problem with battered woman syndrome, critics argue, is its failure to incorporate a complete analysis of women's responses to violence and the social context in which that violence occurs.⁶⁸ Criticism of battered woman syndrome reveals unintended implications of the the-

at 14-15. Finally, in 11 states, it appears that expert testimony on battering and its effects is admissible, but court decisions have discussed only its content, not standards for admission. See *id.* at 15.

⁶⁴ For a state-by-state analysis of the admissibility of expert testimony on battering and its effects, see NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, U.S. DEP'T OF JUSTICE, *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS*, EXPERT TESTIMONY TREND ANALYSIS, app. II at 1-26 (1996) [hereinafter TREND ANALYSIS].

⁶⁵ See, e.g., EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 1-57 (1988); Dutton, *supra* note 12; Mahoney, *supra* note 8; Schneider, *supra* note 58.

⁶⁶ See MARY ANN DUTTON, U.S. DEP'T OF JUSTICE, *IMPACT OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS INVOLVING BATTERED WOMEN* 4 (1996); Schneider, *supra* note 58, at 197.

⁶⁷ See SCHECHTER, *supra* note 2, at 252 (viewing battering as victimization); Schneider, *supra* note 58, at 197 (despite strategy and purpose behind introduction of battered woman syndrome evidence, courts appeared most willing to recognize its importance when rationale for admission was women's weakness).

⁶⁸ See PATRICIA GAGNÉ, *BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE* 37 (1998).

ory of learned helplessness and inappropriate characterization of battered women.⁶⁹

1. Criticism of the Learned Helplessness Theory

In many courts, the substance of the testimony on battered woman syndrome focused primarily on the passive, victimized aspects of a battered woman's experience—her learned helplessness.⁷⁰ Despite the legal strategy and purpose behind the introduction of battered woman syndrome evidence, battered woman syndrome itself was "presented, interpreted and heard as victimization."⁷¹

Although Walker's early observations portrayed battered women as suffering from learned helplessness, more recent work has documented that battered women actively engage in efforts to resist, avoid, escape, and stop the violence against them.⁷² Studies indicate that rather than passively remaining in an abusive relationship, battered women respond to violence in many ways, including reporting it to the police, telling family or friends, seeking shelter and assistance, filing for civil protective orders, separating and divorcing, complying with the batterer's demands, and/or hiding from the batterer.⁷³ Thus, it should not be assumed that a battered woman who has remained in a violent relationship is demonstrating learned helplessness.⁷⁴

Nor should her failure to permanently separate from a violent relationship be viewed as an indication of her individual pathology.⁷⁵

⁶⁹ See MARY ANN DUTTON, U.S. DEP'T OF JUSTICE, VALIDITY OF "BATTERED WOMAN SYNDROME" IN CRIMINAL CASES INVOLVING BATTERED WOMEN 17-19 (Malcolm Gordon ed., 1996) [hereinafter DUTTON, VALIDITY]; PARRISH, *supra* note 63, at 1-2; Schneider, *supra* note 8, at 568; *infra* text accompanying notes 70-91.

⁷⁰ See Schneider, *supra* note 58, at 198-200.

⁷¹ *Id.* at 200. Even if lawyers did not emphasize the learned helplessness component of battered woman syndrome, judges often heard the testimony that way. See *id.* at 198. Courts found it easier to focus on those aspects of the testimony that characterized women as passive and helpless, as exemplified by the theory of learned helplessness. See *id.* at 211.

⁷² See, e.g., GONDOLF & FISHER, *supra* note 65, at 1-39; LEE ANN HOFF, BATTERED WOMEN AS SURVIVORS 3-78 (1990); Dutton, *supra* note 12, at 1196-1242.

⁷³ See GONDOLF & FISHER, *supra* note 65, at 27-32; Mahoney, *supra* note 8, at 5 n.20.

⁷⁴ See GONDOLF & FISHER, *supra* note 65, at 22; DUTTON, VALIDITY, *supra* note 69, at 16. "[T]here is a more important side to consider: the insufficient response of community help sources. If learned helplessness is a valid conception, it is ironically prevalent in the system of helping sources." GONDOLF & FISHER, *supra* note 65, at 22.

⁷⁵ See Mahoney, *supra* note 8, at 6; Schneider, *supra* note 8, at 568. Schneider writes: [P]roblems that battered women face are rarely linked to women's subservient position within society and the family structure, sex discrimination in the workplace, economic discrimination, lack of child care, lack of access to divorce, inadequate

Rather, a battered woman's efforts to respond to violence should be examined in the context of numerous factors outside her control, including police response, economic resources, social services, court decisions regarding custody and visitation, and, most significantly, the danger she faces.⁷⁶

2. Criticism of the Characterization of Battered Women

Battered woman syndrome is sometimes construed as an indication of post-traumatic stress disorder.⁷⁷ Post-traumatic stress disorder entered the lexicon of the mental health profession in 1980, when the disorder was first included in the diagnostic manual of the American Psychiatric Association.⁷⁸ Described as a set of symptoms that follow

child support, problems of single motherhood, and lack of educational and community support. The focus is still on the woman and her individual pathology instead of on the batterer and the social structures that support the oppression of women and glorify violence.

Schneider, *supra* note 8, at 568.

⁷⁶ See GONDOLF & FISHER, *supra* note 65, at 23, 38. At the moment of a battered woman's separation or attempted separation from her batterer, his quest for control over her often becomes acutely violent and potentially lethal. See Mahoney, *supra* note 8, at 5-6. Mahoney proposes that such attacks be named "separation assault" in recognition of the particular assault on a woman's body and autonomy that seeks to block her from leaving, to retaliate if she does leave, or to forcibly end the separation. See *id.* at 6. The challenge, therefore, is to examine the complex and systemic causes of domestic violence:

Despite the immense achievements of the battered women's movement in the past fifteen years, those who work to stop violence against women—those who staff the hotlines and the shelters and the legal service centers, those who press to make law enforcement and criminal justice act responsibly, those who lobby for legislative reform—know that the next time a woman is battered . . . few people will ask: What's wrong with that man? What makes him think he can get away with that? Is he crazy? Did the cops arrest him? Is he in jail? When will he be prosecuted? Is he likely to get a serious sentence? Is she getting adequate police protection? Are the children provided for? Did the court evict him from her house? Does she need any other help? Medical help maybe, or legal aid? New housing? Temporary financial aid? Child support? No, the first question, and often the only question, that leaps to mind is: *Why doesn't she leave?*

ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 131 (1994) (emphasis in original).

⁷⁷ See WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 42, at 124-25; DUTTON, VALIDITY, *supra* note 69, at 19; Schuller & Vidmar, *supra* note 41, at 281.

⁷⁸ See JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 33 (1992). The subject of psychological trauma, including the emergence and naming of post-traumatic stress disorder, has been marked by controversy and political reaction. See *id.* at 7-9. Judith Herman, discussing this "curious history," writes:

The study of psychological trauma must constantly contend with [the] tendency to discredit the victim or render her invisible. Throughout the history of the field, dispute has raged over whether patients with post-traumatic conditions are entitled

psychological trauma, post-traumatic stress disorder is a clinical diagnosis that requires specific identification of designated symptoms, such as flashbacks, intrusive imagery or memories, anger, inability to concentrate, sleep disturbances, avoidance, and dissociation.⁷⁹ However, restricting the concept of battered woman syndrome to fit the construct of post-traumatic stress disorder is problematic.⁸⁰ Such a diagnosis requires a battered woman to fit into the mold of existing diagnostic criteria and results in a limited understanding of the problem of battering, as well as a denial of the underlying issues of trauma.⁸¹ Thus, post-traumatic stress disorder describes only a subset of a range of reactions that may result from exposure to traumatic experiences, and therefore excludes other potentially relevant and important information about a battered woman's experience with, and reaction to, violence.⁸² Moreover, when violence has been chronic and continual, the battered woman's psychological reactions may be more complex than those described by post-traumatic stress disorder.⁸³ Therefore, despite

to care and respect or deserving of contempt, whether they are genuinely suffering or malingering, whether their histories are true or false and, if false, whether imagined or maliciously fabricated. In spite of a vast literature documenting the phenomena of psychological trauma, debate still centers on the basic question of whether these phenomena are credible and real.

Id. at 8. Herman contends that systematic studies of psychological trauma have depended upon the support of concurrent political movements: combat neurosis or "shell shock" in conjunction with activism by Vietnam War veterans; trauma from sexual and domestic violence in conjunction with feminist activism. *See id.* at 9. Moreover, only after the efforts of combat veterans had legitimated the concept of post-traumatic stress disorder, "did it become clear that the psychological syndrome seen in survivors of rape, domestic battery, and incest was essentially the same as the syndrome seen in survivors of war." *See id.* at 32.

⁷⁹ *See* Dutton, *supra* note 12, at 1198-99; DUTTON, VALIDITY, *supra* note 69, at 19. For the diagnostic criteria for post-traumatic stress disorder, see AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427-29 (4th ed. 1994). In a non-clinical but more expressive narrative, author Nancy Raine describes post-traumatic stress disorder as "the human response to overwhelming life experience." *See* NANCY VENABLE RAINE, AFTER SILENCE: RAPE AND MY JOURNEY BACK 56 (1998). Raine believes the symptoms that collectively support a diagnosis of post-traumatic stress disorder should be thought of as "the experience of the past undermining the present." *Id.*

⁸⁰ *See* DUTTON, VALIDITY, *supra* note 69, at 19.

⁸¹ *See* HERMAN, *supra* note 78, at 118-19. The current formulation of post-traumatic stress disorder fails to capture the complexity of the problem for survivors of prolonged, repeated trauma. *See id.* at 119. Furthermore, the direction of psychological inquiry has been strongly influenced by a tendency to blame the victim and a failure to recognize the impact of victimization. *See id.* at 3, 116.

⁸² *See* DUTTON, VALIDITY, *supra* note 69, at 19; HERMAN, *supra* note 78, at 116-22; *see also* Mary Ann Douglas, *The Battered Woman Syndrome*, in DOMESTIC VIOLENCE ON TRIAL, *supra* note 4, at 39, 41 (summarizing how post-traumatic stress disorder as a diagnostic category fails to account for all traumatic effects associated with woman battering).

⁸³ *See* HERMAN, *supra* note 78, at 119-20; Dutton, *supra* note 12, at 1200.

the connotations of the term *syndrome*, battered woman syndrome is not a diagnosable mental disorder; it is a descriptive label that refers to the effects of abuse on women.⁸⁴

Finally, the term *syndrome* serves to stigmatize battered women and create the false impression that they suffer from a mental disease or defect.⁸⁵ Psychological realities of battered women do not fit a singular profile, and the syndrome characterization evokes a stereotypic image of battered women as pathological.⁸⁶ Such terminology mistakenly suggests that it is a battered woman's maladjusted psychological condition that explains her actions.⁸⁷

The emphasis on psychological factors to explain the dynamics of abuse has several drawbacks.⁸⁸ First, this emphasis reinforces the stereotype that battered women are incapable of self-control and are less rational than men.⁸⁹ Second, the emphasis on the individual's psychological factors serves to disconnect the battering from the social and legal context in which it occurs.⁹⁰ Third, by focusing on the battered woman's psychological condition, the batterer's criminal acts, and his responsibility for them, are obscured.⁹¹ Therefore, while psychological reactions to violence may be central to understanding a battered woman's actions, testimony concerning battered women's experiences should be framed within the overall social and cultural contexts that shape women's lives.⁹²

⁸⁴ See Schuller & Vidmar, *supra* note 41, at 281.

⁸⁵ See PARRISH, *supra* note 63, at 2; see also GAGNÉ, *supra* note 68, at 37 ("syndrome tends to be misinterpreted to mean that a battered woman who stays with an abusive mate is mentally ill").

⁸⁶ See PARRISH, *supra* note 63, at 1-2; Dutton, *supra* note 12, at 1196.

⁸⁷ See DUTTON, VALIDITY, *supra* note 69, at 19.

⁸⁸ See Hanna, *supra* note 20, at 1879.

⁸⁹ See *id.*

⁹⁰ See *id.* Feminists maintain that domestic violence is rooted in a patriarchal system of male social, economic, political, and psychological power. See GORDON, *supra* note 4, at 251. "Abuse of women by male partners is embedded in, and grows out of, society's laws and practices denying women equal self-determination and protection in their relationships with men. . . . Violence between partners cannot be adequately understood outside the context within which it occurs." BROWNE, *supra* note 9, at 179. "[V]iolence is a particular form of domination based on social relationships of unequal power. . . . [I]t [is] clear that violence is one mechanism for female social control." SCHECHTER, *supra* note 2, at 34.

⁹¹ See Hanna, *supra* note 20, at 1879. Attributing psychological impairment to the battered woman obscures the link between woman-battering and the criminal justice system that historically condoned it. See *id.*

⁹² See Dutton, *supra* note 12, at 1201.

B. *Renaming Battered Women's Syndrome: Expert Testimony on Battering and its Effects*

When battered woman syndrome testimony was first used to support claims of self-defense, it had a substantial impact on the criminal process.⁹³ Its use demonstrated a judicial recognition of the depth and severity of the problems of sex-stereotyping in the traditional conception of self-defense law.⁹⁴ Almost all of the courts to first consider the issue of expert testimony on battered woman syndrome focused on Lenore Walker's work.⁹⁵ Courts came to recognize the battered woman syndrome rubric, and states incorporated it in statutes governing the admissibility of such testimony.⁹⁶ As battered woman syndrome became widely accepted, the term became a kind of descriptive shorthand for referring to the scientific and clinical literature dealing with the dynamics of a battering relationship.⁹⁷

However, there is a downside to assigning a shorthand explanation to the dynamics of domestic violence and battered women's experiences, particularly when that shorthand term is imprecise and misleading.⁹⁸ In the twenty or so years since the introduction of battered woman syndrome theory, the conceptualization and understanding of domestic violence has continued to change.⁹⁹ Not only have the limitations and inaccuracies of battered woman syndrome been exposed,¹⁰⁰ but the body of scientific literature concerning domestic violence has grown at a rapid rate.¹⁰¹ This knowledge base, incorporating new and revised theories, empirical findings, and clinical observations, has developed greatly since battered woman syndrome was originally defined.¹⁰² Thus, although for many years battered woman syndrome was the rubric under which expert testimony was offered, it is no longer

⁹³ See Schneider, *supra* note 58, at 205.

⁹⁴ See Faigman & Wright, *supra* note 57, at 69; Schneider, *supra* note 58, at 205. Traditional legal interpretations of self-defense law reflect male notions of violence and confrontation—a fight between two equals that gets out of hand. See Schuller & Vidmar, *supra* note 41, at 276.

⁹⁵ See Schneider, *supra* note 58, at 207.

⁹⁶ See Campbell, *supra* note 14, at i; DUTTON, *supra* note 66, at 4.

⁹⁷ See Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 321–23 (1992).

⁹⁸ See PARRISH, *supra* note 63, at 2; Schneider, *supra* note 58, at 207–08.

⁹⁹ See Dutton, *supra* note 12, at 1196–97.

¹⁰⁰ See *supra* Part III A.

¹⁰¹ See Dutton, *supra* note 12, at 1196–97.

¹⁰² See DUTTON, *supra* note 66, at 5, 6; VALIDITY & USE, *supra* note 14, at vi.

an adequate characterization of the breadth of available knowledge regarding battering and its effects.¹⁰³

A more accurate representation of this knowledge is expressed by language that is now recommended by many expert witnesses and commentators: "expert testimony on battering and its effects."¹⁰⁴ The renaming of this testimony is not merely a verbal distinction; it un-masks images and inaccuracies attached to the "battered woman syndrome" nomenclature.¹⁰⁵ Thus, the use of a newer, more accurate term, "expert testimony on battering and its effects," is critical to understanding a new and emerging trend in the use of this testimony.¹⁰⁶

IV. PROSECUTORIAL USE OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS

The most striking trend in the acceptance of expert testimony on battering and its effects is its emerging use in the prosecution of batterers.¹⁰⁷ At the beginning of the 1990s, courts paid little attention to the use of such expert testimony by the prosecution, and very few addressed its admissibility.¹⁰⁸ However, by 1999, twenty-seven states have

¹⁰³ See DUTTON, *supra* note 66, at 6; VALIDITY & USE, *supra* note 14, at vii.

¹⁰⁴ See, e.g., *People v. Humphrey*, 921 P.2d 1, 17 n.3 (Cal. 1996); Dutton, *supra* note 12, at 1201; VALIDITY & USE, *supra* note 14, at i. The Violent Crime Control and Law Enforcement Act of 1994, Section 40507 of Title IV, the Violence Against Women Act, mandated a report on battered woman syndrome, including the extent to which it has been considered as evidence in criminal trials and an assessment of the effects of that evidence. See 42 U.S.C. § 14013 (1995); Campbell, *supra* note 14, at i. The resultant report reflects a strong consensus among researchers, judges, prosecutors, and defense attorneys that the term "battered woman syndrome" is inadequate and should be replaced by the term "expert testimony on battering and its effects." See Campbell, *supra* note 14, at i-ii; PARRISH, *supra* note 63, at 2.

¹⁰⁵ See *supra* text accompanying notes 70-92.

¹⁰⁶ In an examination of the use of words in response to domestic violence, Martha Minow writes, "Redefining as unacceptable that which previously has been acceptable will remain difficult unless society can acquire a different language" Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1672 (1990). Minow adds, "There still may be other ways of talking, however, that better convey experiences of violence, pain, and abuse, or that better prompt action to resist and prevent violence." *Id.* at 1686. Presenting evidence on *battering and its effects*, instead of evidence on *battered woman syndrome*, is the better way to convey experiences of battering. See PARRISH, *supra* note 63, at 2 (emphasis added).

¹⁰⁷ See PARRISH, *supra* note 63, at 20. In those jurisdictions that have addressed the admissibility of expert testimony on battering and its effects, whether in court decisions or by statute, the terminology for that evidence varies: some refer to "battered woman syndrome," "battered spouse syndrome," the effects of "domestic violence" or "family violence," or more generic terms related to battering and its effects. See *id.* at 16. Henceforth, throughout this Note, the term "expert testimony on battering and its effects" will be used.

¹⁰⁸ See Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a*

admitted or discussed with favor expert testimony on battering and its effects in the prosecution of certain cases.¹⁰⁹

Introducing expert testimony to describe the lives and experiences of battered women has a potentially broader application in the prosecution of batterers than in the defense of battered women.¹¹⁰ While the introduction of expert testimony on battering and its effects by prosecutors is still an uncommon practice in many state courts, the greater opportunity for the use of this evidence, by numbers alone, lies with prosecutors.¹¹¹ The use of expert testimony on battering and its effects can assist in the successful prosecution of batterers, particularly in those cases where convictions may be otherwise unlikely.¹¹² Further-

Batterer, 76 IOWA L. REV. 553, 554 (1991). By 1990, only four courts had addressed the admissibility of expert testimony on battering and its effects in the prosecution of a batterer: three held that such evidence was admissible; one held that it was inadmissible. *See id.*; *see also* State v. Baker, 424 A.2d 171 (N.H. 1980) (battered woman syndrome evidence admissible to rebut insanity defense); State v. Frost, 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990) (battered woman syndrome evidence admissible to explain victim's behavior); Washington v. Ciskie, 751 P.2d 1165 (Wash. 1988) (battered woman syndrome evidence admissible to rebut defense claims regarding victim's inconsistent behavior); Pruitt v. State, 296 S.E.2d 795 (Ga. Ct. App. 1982) (battered woman syndrome evidence inadmissible where there was not a woman defendant claiming self-defense and no evidence was introduced that victim was a battered woman).

¹⁰⁹ In 1995, 23 states had admitted or discussed prosecution use of expert testimony on battering and its effects. *See* TREND ANALYSIS, *supra* note 64, app. II at 1-26, app. III at 1-5. Since 1995, at least four more states have admitted such testimony. *See* State v. Griffin, 564 N.W.2d 370 (Iowa 1997); People v. Daoust, 577 N.W.2d 179 (Mich. Ct. App. 1998); State v. Stringer, 897 P.2d 1063 (Mont. 1995); Scugoza v. State, 949 S.W.2d 360 (Tex. Ct. App. 1997). Expert testimony on battering and its effects offered by the prosecution is now admissible for certain purposes in Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, South Carolina, Texas, Washington, Wisconsin, and Wyoming. *See id.*; TREND ANALYSIS, *supra* note 64, app. II at 1-26, app. III at 1-5. These states have varying evidentiary standards that produce various approaches to the determination of relevance and scope of prosecutorial use of expert testimony on battering and its effects. *See id.*

¹¹⁰ *See* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 219 (1992).

¹¹¹ *See id.* For illustrative purposes, Ms. Bowman, a Deputy City Attorney for the City of Los Angeles, provides a representative comparison of self-defense cases and cases in which a batterer is prosecuted: in California, approximately 600 battered women are currently in prison for killing their partners; 21,000 batterers are prosecuted yearly for crimes of domestic violence in the City of Los Angeles alone. *See id.* While many of these prosecutions would not necessarily require the use of expert testimony on battering and its effects, the numerical comparison of defense cases with prosecution cases reveals the greater opportunity for prosecutorial use of this evidence. *See id.* Ms. Bowman argues that expert testimony on battering and its effects should be as commonplace in the prosecution of batterers as is blood-alcohol evidence in the prosecution of drunk drivers. *See id.*

¹¹² *See infra* text accompanying notes 118-23.

more, its use may result in a reduction in the number of prosecutions of battered women who resort to killing in self-defense.¹¹³

A. Framework for Admitting Expert Testimony on Battering and Its Effects

In order to admit expert testimony on battering and its effects on behalf of the prosecution, a court must find that the testimony is relevant and that it meets general standards governing admissibility of expert testimony.¹¹⁴ Thus, a framework for introducing such testimony should address the following issues: (1) relevance of the evidence to issues in the prosecution's case; (2) usefulness of the evidence to the trier of fact; (3) acceptance of the scientific basis for admission of the evidence; and (4) qualifications of the expert.¹¹⁵

1. Relevance of the Evidence to Issues in the Prosecution's Case

The admission of evidence about battering and its effects becomes an issue in a case in which a batterer is being prosecuted for a crime of domestic violence and the battered victim's behavior or conduct is raised as part of the batterer's defense.¹¹⁶ The prosecution may then seek to introduce expert testimony about battering and its effects in order to explain the victim's prior inconsistent statements, to rehabilitate the victim's testimony if her credibility is attacked, to corroborate her testimony after an impeachment attempt, or to prove an element of the state's case against the batterer.¹¹⁷

¹¹³ See Bowman, *supra* note 110, at 220.

¹¹⁴ See *Developments in the Law*, *supra* note 28, at 1582-83. For an example of the criteria courts may consider in determining the admissibility of expert testimony, see *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). The *Dyas* analysis consists of three prongs: (1) the subject matter "must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman"; (2) the witness "must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth"; and (3) the "testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted . . . by an expert." See *id.* In states with evidence codes that parallel the Federal Rules of Evidence, the broader standard of Rule 702 applies: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

¹¹⁵ See Bowman, *supra* note 110, at 232-51.

¹¹⁶ See DUTTON, VALIDITY, *supra* note 69, at 4.

¹¹⁷ See Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By*

Two fact patterns typify those cases in which expert testimony on battering and its effects is relevant to issues in the prosecution's case.¹¹⁸ In the first, a battered woman gives an initial statement to the police, a grand jury, or in a deposition, but recants her earlier statement at trial.¹¹⁹ In rebuttal, the prosecution may offer testimony on battering and its effects to explain the witness' inconsistent statements.¹²⁰ In the second example, the defense attacks a battered woman's credibility by targeting her behavior or conduct, questioning why she remained in the battering relationship, delayed reporting the incident, or changed her story.¹²¹ In this situation, the prosecution may offer testimony on battering and its effects to rehabilitate the victim's credibility by explaining her conduct.¹²² In both examples, the expert testimony about battering and its effects can help judges and jurors understand the experiences, beliefs, and perceptions of women who have been beaten by their intimate partners.¹²³

and *Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 802 (1996); Schroeder, *supra* note 108, at 565-66.

¹¹⁸ See PARRISH, *supra* note 63, at 20.

¹¹⁹ See *id.*

¹²⁰ See *People v. Ellis*, 650 N.Y.S.2d 503, 504 (N.Y. App. Div. 1996); PARRISH, *supra* note 63, at 20. In *People v. Ellis*, the defendant was charged with assaulting his wife. See 650 N.Y.S.2d at 503. Shortly after his arrest, the complainant, the defendant's wife, testified at grand jury and cooperated with the prosecution. See *id.* After the defendant was indicted, the complainant recanted her sworn accusations and refused to testify at trial. See *id.* The prosecution subpoenaed the complainant to appear at trial, where she testified reluctantly, recanting and minimizing her earlier grand jury testimony. See *id.* at 504. The prosecution presented expert testimony on battering and its effects to aid the jury in understanding the complainant's recantation. See *id.*

¹²¹ See PARRISH, *supra* note 63, at 20.

¹²² See *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 243 (Mass. App. Ct. 1997); PARRISH, *supra* note 63, at 20. In *Commonwealth v. Goetzendanner*, the defendant was charged with aggravated rape, kidnapping, and assault and battery. See 679 N.E.2d at 241-42. On several occasions, the victim had tried to end her relationship with the defendant and left him, only to resume the relationship after being swayed by his emotional entreaties to return. See *id.* at 242. After the attack on the victim which resulted in charges being brought against the defendant, the victim visited him in jail while he was awaiting trial. See *id.* at 243. Subsequently, she had a restraining order against the defendant removed, recanted her earlier statements to the police concerning the attack, and attributed the attack to a former boyfriend. See *id.* The prosecution presented expert testimony on battering and its effects to counter defense cross-examination of the victim concerning her erratic conduct and her vacillating behavior toward the defendant. See *id.*

¹²³ See *Goetzendanner*, 679 N.E.2d at 243; *Ellis*, 650 N.Y.S.2d at 505-06. The *Goetzendanner* court explained:

To the average juror, untutored in the psychological dynamics of domestic violence, the victim's vacillating behavior toward the defendant—in particular, her back and forth attempts to end the relationship—might have seemed counterintuitive and might even have suggested that her version of events was inherently unreliable and unworthy of belief. To help blunt the possible impact upon jurors of the victim's

2. Usefulness of the Evidence to the Trier of Fact

In spite of, or because of, increased public awareness of domestic violence, jurors come to a trial with assumptions and preconceptions about crimes of domestic violence, perpetrators, and victims.¹²⁴ Jurors may expect victims and batterers to fit certain stereotypes and may have certain expectations regarding a battered woman's behavior in a battering situation.¹²⁵ Whether a battered woman recants at trial or testifies willingly, much of the prosecution's case against a batterer is focused on the victim, and much of the batterer's defense is focused on challenging her credibility:

[T]he focus of the case remains on her—her actions before, during, and after the assault, her appearance, her demeanor on the stand, her lifestyle, income, companions, race, and religion. The principal questions remain: what did she do to deserve or provoke the violence, or, why is she making all this up? If any of this had happened as she described it, then why didn't she leave? Why did she stay with him so long before moving? Why did she wait so long to report it? Why didn't she tell her family and friends? Why is she still with him if he had beaten her?¹²⁶

erratic conduct . . . the Commonwealth . . . offered expert testimony on [battering and its effects].

679 N.E.2d at 243.

In *Ellis*, the court concluded:

The actions of [battered women] are subject to many misconceptions or myths, including the belief that the woman provokes the beatings or likes the beatings since she neither leaves the batterer nor seeks help. The nature of a battered woman's behavior is such that an often drawn "common sense" conclusion is that the abuse has not in fact happened. . . . [E]xpert testimony on [battering and its effects] is relevant to assist the jury to evaluate pre-incident and post-incident or pre-indictment conduct of the complainant, [and] it is admissible to aid the jury in its evaluation of the complainant's postindictment behavior.

650 N.Y.S.2d at 505–06 (citations omitted).

¹²⁴ See Bowman, *supra* note 110, at 242. Even with increased national attention to the scope of the problem of domestic violence, most people have not met the numbers of victims that an expert has, have not observed the obstacles to escape, and have not witnessed the patterns of abuse and its effects on survivors. See *id.* Furthermore, the public's exposure to popular media interpretations of domestic violence may actually limit their appreciation of the complexity of battering and its effects and may reinforce stereotypical images of batterers and victims. See *id.* at 234.

¹²⁵ See *id.* at 242.

¹²⁶ *Id.* at 241.

Expert testimony identifying the dynamics of domestic violence and the patterns of behavior in battering relationships is relevant to explaining these issues and is crucial to assist the factfinder in understanding the reasonableness of a battered woman's actions.¹²⁷ Such expert testimony is particularly important for evaluating credibility when the victim's actions in court do not comport with the jury's expectations.¹²⁸

a. *Establishing the Usefulness of the Evidence by Voir Dire Questions*

The prosecution must establish that the trier of fact will be assisted by the proposed expert testimony on battering and its effects.¹²⁹ In jurisdictions where the scope of voir dire questioning permits it, the jury should be questioned to elicit responses which reflect jurors' misconceptions and assumptions about domestic violence and battered women.¹³⁰ Voir dire questions should address jurors' stereotypical perceptions of domestic violence and the limitations on their information about, and understanding of, the problem.¹³¹

b. *Establishing the Usefulness of the Evidence with Research Literature*

The prosecution may also cite research studies to support its assertion that the proposed expert testimony on battering and its effects will assist the trier of fact.¹³² Numerous studies document findings that most people are misinformed about domestic violence and hold misconceptions about battered women.¹³³

¹²⁷ See DUTTON, VALIDITY, *supra* note 69, at 3-4; Bowman, *supra* note 110, at 246-47.

¹²⁸ See Bowman, *supra* note 110, at 246-47. For example, a victim testifying on the stand may exhibit any number of responses that some jurors would consider inappropriate: she may appear angry, defiant, passive, unanimated, unemotional, belligerent, confrontational, strong, confident, or successful. See *id.* at 247.

¹²⁹ See *id.* at 235.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *Washington v. Ciskie*, 751 P.2d 1165, 1170 (Wash. 1988) ("general public is unaware of the extent and seriousness of the problem of domestic violence," quoting U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 77 (1982)); see also Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE AND VICTIMS 271 (1991); Charles P. Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myth*, 2 J. FAM. VIOLENCE 257 (1987).

3. Acceptance of the Scientific Basis for Admission of the Evidence

Courts in all fifty states have accepted the scientific basis for admission of evidence about battering and its effects in cases in which the battered woman is the defendant,¹³⁴ and therefore have established a basis for allowing the admission of such evidence on behalf of a victim or a witness who is not a defendant.¹³⁵ Additionally, some jurisdictions have allowed expert testimony concerning the reactive behavior of the victim in rape and child sexual abuse prosecutions.¹³⁶ By analogy, the acceptance of the scientific basis for admission of expert evidence about rape and child sexual abuse victims suggests the admissibility of expert evidence on battering and its effects on behalf of a victim of battering.¹³⁷

4. Qualifications of the Expert

A court has discretion to qualify an individual as an expert witness based upon the individual's "knowledge, skill, experience, training, or education."¹³⁸ The expert witness may testify to "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue"¹³⁹

¹³⁴ See *supra* text accompanying notes 63–64.

¹³⁵ See, e.g., *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 245–46 (Mass. App. Ct. 1997) (faced with the question whether certain evidence should be admissible to a victim who is not a defendant, the court concluded that the ends of "justice and crime prevention would be ill-served if we were to deny the use of evidence of [battering and its effects] to a victim seeking redress through the legal system for her injuries, only to allow that same evidence after she finally has taken matters into her own hands and is then placed on trial for killing or assaulting her abuser"); *Ciskie*, 751 P.2d at 1166 (deciding whether to extend the benefit of concepts it has applied to defendants charged with a crime to those who are victims of a crime, the court found that "[n]either logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror's understanding").

¹³⁶ See *Schroeder*, *supra* note 108, at 563–64; see also *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989) (allowing expert testimony on general behavioral characteristics of child abuse victims); *Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989) (allowing expert testimony on general behavioral characteristics of sexually abused children); *Commonwealth v. Mamay*, 553 N.E.2d 945 (Mass. 1990) (allowing expert testimony regarding rape and sexual assault syndrome).

¹³⁷ See *Schroeder*, *supra* note 108, at 564.

¹³⁸ FED. R. EVID. 702; see also *Geotzendanner*, 679 N.E.2d at 244 ("The witness did not have to be a trained clinician, capable of diagnosing particular cases . . . in order for the judge to qualify her as an expert The witness's credentials, which included extensive experience in training and educating other professionals on [the dynamics of domestic violence], adequately qualified her to testify about the particular psychological dynamics of domestic abuse") (citation omitted).

¹³⁹ See FED. R. EVID. 702.

The jury should also learn how the expert is qualified to give an opinion about battering and its effects.¹⁴⁰ Although opposing counsel may offer to stipulate to the expert's qualifications to prevent the jury from hearing the details of the expert's experiences and credentials, the prosecution should turn down the offer with an explanation that the expert's qualifications are critical to the jury's consideration of the weight to be given to the expert's testimony.¹⁴¹

B. The Introduction of Expert Testimony on Battering and Its Effects on Behalf of the Prosecution

Expert testimony on battering and its effects may be introduced as soon as an attack on the victim's credibility is made by the defense.¹⁴² Thus, the testimony may be offered either during the prosecution's case-in-chief when the victim's credibility is attacked by the defense on cross-examination, or in rebuttal after the defense has directly attacked the victim's credibility.¹⁴³

Although expert testimony in cases involving battered women may be either general or case-specific, when the prosecution calls an expert witness, that expert will usually testify generally about battering and its effects.¹⁴⁴ The expert's opinion or conclusions may be framed in response to hypothetical questions posed by the prosecution about typical victims of battering, but the expert should not testify to opinions or conclusions about the specific victim or the specific facts of the

¹⁴⁰ See Bowman, *supra* note 110, at 250-51.

¹⁴¹ See *id.* at 251.

¹⁴² See *id.*; Schroeder, *supra* note 108, at 571.

¹⁴³ See Bowman, *supra* note 110, at 251; Schroeder, *supra* note 108, at 571. The attack on the victim's credibility need not be direct; the defense may attack the victim's credibility when questioning other witnesses. See Schroeder, *supra* note 108, at 572. This type of credibility attack—for example, questioning family members to impeach the victim's credibility—justifies the admission of expert testimony on battering and its effects. See *id.*

¹⁴⁴ See DUTTON, VALIDITY, *supra* note 69, at 21; Dutton, *supra* note 12, at 1202-03. Whether general testimony or case-specific testimony is offered will depend upon the facts of the case, case law or statutes governing admissibility, available resources, and case strategy. See DUTTON, VALIDITY, *supra* note 69, at 21. General testimony, such as that which is offered by the prosecution, is based upon an understanding of the scientific and clinical knowledge about battering and its effects. See *id.* Case-specific testimony, on the other hand, provides information about a specific battered woman and the specific context in which the battering occurred. See *id.* Case-specific testimony and an expert's conclusions about a particular battered woman require a face-to-face evaluation of that woman. See *id.* Thus, in the prosecution of a batterer, where the victim is not cooperating with the prosecution, it is unlikely that the victim would consent to a face-to-face evaluation, even if case-specific testimony were permitted according to case law or statute. See Dutton, *supra* note 12, at 1202-03.

case.¹⁴⁵ Indeed, in most prosecutorial situations, the expert will not have met, examined, or evaluated the battered woman who is the victim in the prosecution's case.¹⁴⁶

CONCLUSION

For a long time, the criminal justice system, like society at large, ignored the breadth and seriousness of domestic violence. Legal institutions viewed domestic violence as a private and personal matter, not as a criminal act; non-intervention was the hallmark of the institutional response to battered women. However, over the course of the past two decades, the social and legal attention to domestic violence has increased dramatically. The criminal justice system implemented institutional reforms to ensure that domestic violence is recognized and treated as a crime. Improving the prosecutorial response to domestic violence is an important step in that process.

In implementing affirmative, vigorous prosecutions of batterers, prosecutors face challenges and misconceptions surrounding the experiences of battered women. It is important that prosecutors develop an adequate understanding of the dynamics of domestic violence and the social context that shapes battered women's reactions to that violence. An extensive body of scientific and clinical knowledge identifies the relevance of battering as a factor in the reactions and behavior of victims of domestic violence.

When a battered woman is a victim/witness in the prosecution of her batterer, prosecutors must be able to prepare trial strategies based on the possibility that she will recant previous statements, is unwilling to cooperate with the prosecution, or has engaged in behavior that the factfinder may find puzzling. In any of these circumstances, the introduction of expert testimony on battering and its effects can assist the factfinder in considering the evidence presented in the case. Although

¹⁴⁵ See *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 245 (Mass. App. Ct. 1997) ("evidence is confined to a description of the general or expected characteristics shared by typical victims. . . . The evidence may not relate directly to the symptoms exhibited by an individual victim or victim witness, nor may it include an opinion or diagnosis that that person suffers from the described condition."); *People v. Ellis*, 650 N.Y.S.2d 503, 508 (N.Y. App. Div. 1996) ("expert testimony is not offered to show that assaults or other crimes occurred or that the complaining witness was lying. . . . [A]n expert will not comment on credibility, nor offer any evidence as to whether a crime was committed, nor opine as to whether the complaining witness is a battered woman."); see also *Bowman*, *supra* note 110, at 248 ("expert usually testifies by commenting on a hypothetical question, posed by the prosecutor, based on the particular facts in evidence").

¹⁴⁶ See, e.g., *Goetzendanner*, 679 N.E.2d at 244 (expert never examined victim and never met with or talked to her); *Ellis*, 650 N.Y.S.2d at 508 (expert had no contact with complainant).

for many years battered woman syndrome was the rubric under which such expert testimony was offered, such terminology is no longer an accurate or adequate characterization of the breadth of available knowledge. Thus, reconceptualizing battered woman syndrome evidence as evidence on battering and its effects is an important tool in implementing an aggressive prosecutorial response to domestic violence.